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Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1995

PEOPLE OF THE STATE OF MICHIGAN,
Respondent,

v.

LUANNE SZENAY,
Petitioner.

On Petition For A Writ Of Certiorari
To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW.

Was it a violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution to admit in a trial for conspiracy to commit first degree murder and aiding and abetting first degree murder, statements by non-testifying co-defendant Shawn England which incriminated defendant Luanne Szenay, where the portions of co-defendant England's statement which incriminated Defendant Szenay were not self-inculpatory against co-defendant England?

Can confessed murder Blau's plea-bargain-induced testimony be considered as a indicia of reliability of an interlocking confession by non-testifying co-defendant England which implicated defendant Szenay, to render England's confession admissible under the Confrontation Clause of the Sixth Amendment of the United States Constitution?

LIST OF PARTIES.

People of the State of Michigan, Plaintiff
Luanne Szenay, Defendant
Shawn England, Defendant

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18th Judicial Circuit Court, judgment of sentence, commitment to Corrections Department, February 20, 1991, case number 90-1270-FC-C.

CONCISE STATEMENT OF BASIS FOR JURISDICTION.

(i) The order of the Michigan Supreme Court denying leave to appeal was dated March 26, 1996.

(ii) No order respecting rehearing has been entered.

(iii) This matter does not involve a cross petition for a writ of certiorari.

(iv) 28 USC Section 1257(a) provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court by Writ of Certiorari.

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE.

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

CONCISE STATEMENT OF THE CASE.

Petitioner Luanne Szenay was convicted on January 10, 1991, of conspiracy to commit first degree murder and first degree murder (App. pp.48-49). Szenay was jointly tried with co-defendant Shawn England, who was also convicted. On February 19, 1991 Szenay was sentenced to two mandatory terms of life imprisonment on both counts, one sentence parolable, the other not parolable. (App. pp.48-49)

The actual killing of Timothy Szenay was carried out by James Blau and Shawn England. Luanne Szenay was not present at the killing. The theory of Luanne Szenay at trial was that she was not guilty and was not involved in the plot or in the death of Timothy Szenay.

Neither Luanne Szenay nor Shawn England testified at trial. Detective Harkin testified to a statement made by England implicating Szenay in the murder. Szenay's objections to the admission of statements by England were overruled. Circuit Court Judge Caprathe made the following ruling on Szenay's objection to the admission of England's statement:

> THE COURT: Alright. Then along came Watkins [**People v.**

Watkins, 178 Mich.App. 439; 44 N.W.2d 901 (1989)] and Spinks [**People v. Spinks**, 184 Mich.App. 559; 458 N.W.2d 899 (1989)] and regardless of the instincts that we have built up and have developed as a result of Bruton [**v. United States**, 391 U.S. 123; 88 S.Ct. 1620; 20 L.Ed.2d 476 (1968)] and in -- have been experiencing, they threw a different light on Bruton and how it applies in Michigan and that's the law that the case has available to it to follow in Michigan. And that may not end up being the law if the Supreme Court's decides to -- if the Supreme Court decides that something is different, but that's the law I have before me to apply in this case and it doesn't appear to me that it would be fundamentally unfair. What it says is is that confessions really can be used when they implicate a codefendant when the statement that's made is against the penal interest and there are other separate instances of indicia of reliability that can be gleaned from the remainder of the case and can be articulated.

And I think Mr. Kelly's articulated them in both instances that the statements are consistent with what the testimony of Blau, substantially, they're not gonna be in every respect, but they're consistent with other evidence in the case that we've already

had and that we're going to be having such as the shotgun and the--the--the--the directions and the location and the movement in the house and the other evidence in the case so that it would appear to me that although this isn't a codefendants confession that's being used against each other, it's similar in that there's a defend--there is a person who's not a codefendant but is still a defendant testifying. And there is a consistency between his testimony and the confession of Mr. England, at least they're substantially consistent; and the--also there is a consistency between the statement to Mr. Belmont and the testimony of Mr. Blau and the confession of Mr. England; and there is a consistency in the statements and the confessions with the evidence that is being independently offered with respect to the factors in the confession. And the exception which are two, is one, the already referred to statement against penal interest be--and the unavailable nature of the situation because the witness is not gonna be--the codefendant is not gonna be testifying. And then you have the conspiracy exception that--that is being talked about to both the private witness and in the confession to the officer are statements that--and activities, etcetera, that were part of the conspiracy

> which really was involved between both Mr. England and Mr. Blau and Mr. Blau and Ms. Szenay. At least as they're alleged to have occurred and are established by other evidence in the case than merely those particular statements; and therefore, the Court believes that they are admissible under those cases and overrules the objection to them. (App. pp.44-46)[1]

In his statement to Detective Harkin, England admitted shooting Tim Szenay as Jim Blau held him. England told the detective that Blau stated that Luanne Szenay would collect $300,000 in insurance and that Blau and England would get 10 percent of that, $30,000. (App. pp.95-96) England also "said that Jim was getting money from Luanne before and after the homicide." (App. p.95) The morning after

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1 The first part of the discussion on December 18 concerned statements that Shawn England allegedly made to Stanley Belmont at a party in Florida before his arrest. The prosecutor ultimately decided to use Belmont's story only as it incriminated England and not to use any of Belmont's statements concerning Luanne Szenay. (App. p.47)

the shooting Luanne Szenay called Jim Blau (App. p.97). According to England, Szenay said that Tim had been killed, and was trying to make it sound as if she was surprising Blau, in case the phone was tapped. (App. pp.96-97)

James Blau testified at trial pursuant to a plea agreement, and admitted that he took the plea bargain to avoid the mandatory sentence of life without parole. Luanne Szenay talked with Blau about how her life was in a shambles, that Tim Szenay was deeply involved in drugs and that she would be better off without him around. Blau testified he offered to kill Tim Szenay for $30,000 of the life insurance money, to which Luanne agreed. Blau called England in Florida to ask if he wanted to make $15,000 for killing a man. England agreed. As far as Blau knew, England had not met Luanne Szenay. (App. p.101) Blau said that the detective who arrested him lied to him and told him that Luanne Szenay had implicated him in murdering Tim Szenay. (App. p.101)

Luanne Szenay appealed as of right to the Michigan Court of Appeals. In a two page per curiam opinion the Michigan Court of Appeals, addressing both Szenay's

and England's appeals as of right, affirmed the conviction. The full discussion by the Court of Appeals of the Confrontation Clause argument is as follows:

> We also reject defendant Szenay's claim that reversal is mandated because the court erred in admitting portions of England's confession as evidence against her as well as England's escape from jail. Evidence regarding England's escape was irrelevant and thus not prejudicial to Szenay and any error in the admission of England's confession was harmless given admission of the third co-conspirator's confession. **Richardson, supra**. [**People v. Richardson**, 204 Mich.App. 71; 514 N.W.2d 503 (1994)] (People v. Shawn England, People v. Luanne Szenay, Michigan Court of Appeals Opinion, No. 138219; 138272; 138992, 5/23/95, p2) (App. pp.70-71)

Petitioner Szenay filed an Application for Leave to Appeal with the Michigan Supreme Court. (App. p.72) The Michigan Supreme Court by an order entered March 26, 1996, denied Szenay's Application for Leave to Appeal, with Justice Cavanagh stating that he would grant leave to appeal. (App. p.91)

ARGUMENT

The decisions of the Michigan Supreme Court and the Michigan Court of Appeals, holding that the admission into evidence of a non-testifying co-defendant's statement implicating the defendant does not violate the confrontation clause of the Sixth Amendment of the United States Constitution, conflicts with decisions of this Court.

The Michigan courts improperly held that the non-testifying co-defendant's statement implicating defendant Szenay was admissible as a declaration against penal interest, and had sufficient indicia of reliability based on its consistency with other extrinsic evidence at trial, theories which have been rejected by this Court.

The use of a co-defendant's, plea-bargain-induced testimony as indicia of reliability of a non-testifying, co-defendant's confession implicating the defendant is an issue under the Confrontation Clause of the Sixth Amendment which has not been, but should be settled by this Court.

Admission of a non-testifying co-defendant's confession implicating the defendant violates defendant's right of cross examination secured by the Confrontation Clause of the Sixth Amendment. **Bruton v. United States**, 391 U.S. 123; 88 S.Ct. 1620; 20 L.Ed.2d 476 (1968). Where a hearsay-declarant is not present for cross examination at trial his statement is admissible under the Confrontation Clause only if it bears adequate "indicia of reliability." **Ohio v. Roberts**, 448 U.S. 56, 66; 100 S.Ct. 2531, 2539; 65 L.Ed.2d. 597 (1980).

Reliability can be inferred where the evidence falls within a "firmly rooted" hearsay exception, absent a showing of "particularized guarantees of trustworthiness." **Ohio v. Roberts**, 448 U.S. at p66; 100 S.Ct. at p2539. This Court in **Lee v. Illinois**, 476 U.S. 530, 543-544; 106 S.Ct. 2056, 2063-2064; 90 L.Ed.2d. 514 (1986) (footnote 5) did not consider the "declaration against penal interest" hearsay exception to be "firmly rooted," and instead decided the case as one involving a confession by an accomplice which incriminated a criminal defendant. The declaration against penal

interest concept "defines too large a class for meaningful Confrontation Clause analysis." **Lee, Idem.**, footnote 5.

The trial court, despite the "instincts . . . developed as a result of **Bruton**" (App. p.44), held England's statement to be admissible as a statement against penal interest (App. p.45). The trial court also based its ruling of admissibility on "indicia of reliability that can be gleaned from the remainder of the case" (App. p.45), including the consistency of England's confession with Blau's testimony (App. p.45), and other extrinsic evidence in the case. (App. p.46) The trial court made no finding that any circumstance surrounding England's confession made that evidence inherently credible. The Michigan Court of Appeals, and the Michigan Supreme Court affirmed these rulings of the trial court.

These holdings conflict with this Court's decision in **Idaho v. Wright**, 497 U.S. 805, 822; 110 S.Ct. 3139, 3150; 111 L.Ed.2d 638 (1990) which held that, to be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent

trustworthiness, not by reference to other evidence at trial. **Idem**, 497 U.S. at p822; 110 S.Ct. at p3150. The holding also conflicts with this Court's rejection in **Lee v. Illinois, supra**, of the declaration against penal interest hearsay exception as a basis for admissibility.

Lee v. Illinois, **Idem.**, 476 U.S. at pp544-546; 105 S.Ct. at pp2064-2065, held that a co-defendant's statement, "interlocking" with defendant's statement provided an insufficient indicia of reliability for admission. See also **Cruz v. New York**, 481 U.S. 186; 107 S.Ct. 1714; 95 L.Ed.2d 162 (1987), holding that admission of a non-testifying co-defendant's confession incriminating the defendant violates the Confrontation Clause even if it "interlocks" with the defendant's own confession. In the present case, the Michigan Court of Appeals opinion is contrary to **Lee v. Illinois**. The Michigan Court of Appeals held that the trial testimony of Blau, implicating Szenay pursuant to a plea-bargain, rendered admission of England's confession harmless. (App. pp.70-71)

While the Defendant's own confession may be considered on appeal in assessing

whether any Confrontation Clause violation was harmless, **Cruz v. New York**, 481 U.S. at pp193-194; 107 S.Ct. at p1719, the plea-bargain induced testimony of one co-defendant, rendered suspect by the consideration provided, and subject to the same influences as a non-testifying co-defendant, provides a much less convincing theorem in the harmless error calculus. It cannot be said beyond a reasonable doubt that the jury's verdict would have been the same without evidence of England's incriminating statement. Although Blau's testimony was subject to cross-examination, it was supported by the unimpeached and uncross-examined statement of England. Jurors who may have been unwilling to accept Blau's testimony standing by itself, may have been induced to accept Blau's testimony on the basis of England's unimpeached statement, delivered to the jury in the prosecutor's case-in-chief through Detective Harkin, with the clear message to the jury that the police and prosecutor were vouching for the credibility of England's statement.

Where defendant Szenay did not confess to the murder, and maintained her innocence, the "interlocking" testimony of

co-defendant Blau does not provide sufficient indicia of the reliability of the confession of non-testifying co-defendant England. The police employed the artifice against both Blau and England that Szenay had already implicated them in order to induce them to confess, (App. pp.98-99), thereby providing Blau and England with a motive to implicate Szenay and a motive to make "consistent" statements. Blau also testified pursuant to a plea bargain to escape a life sentence without possibility of parole.

A co-defendant's confession is presumptively unreliable as to passages dealing with defendant's culpability due to the co-defendant's desire to spread blame or curry favor. **Lee v. Illinois, Idem**, 476 U.S. at p545; 106 S.Ct. at p2064. The use of defendant's own interlocking confession as an indicia of reliability of a non-testifying co-defendant confession was not countenanced in **Lee v. Illinois**. The same defective reasoning rejected in **Lee v. Illinois** cannot be extended to using a second co-defendant's plea-bargained trial testimony as an indicia of reliability of the non-testifying co-defendant's confession.

Further, a statement collateral to a self-inculpatory statement is not admissible under **F.R.E. 804(b)(3)**[2]. **Williamson v. United States**, ___ U.S. ____; 114 S.Ct. 2431; 129 L.Ed.2d 476 (1994). Those portions of England's statements incriminating Szenay were not self-inculpatory.

To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. **Idaho v. Wright**, 497 U.S. 805, 822; 110 S.Ct. 3139, 3150; 111 L.Ed.2d 638 (1990). Admission of a statement under a "firmly rooted" hearsay exception indicates that the statement is so trustworthy that adversarial testing can add little to its reliability. **White v. Illinois**, 502 U.S. 346; 112 S.Ct. 736, 743; 116 L.Ed.2d 848 (1992). The collateral statements of co-

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2 M.R.E. 804(b)(3), considered by the trial court below, is identical to F.R.E. 804 (b)(3).

defendant England implicating defendant Szenay are inherently untrustworthy, cannot provide the indicia of reliability required under **Idaho v. Wright, Idem.**, and are not of such a nature that cross examination could not challenge their reliability.

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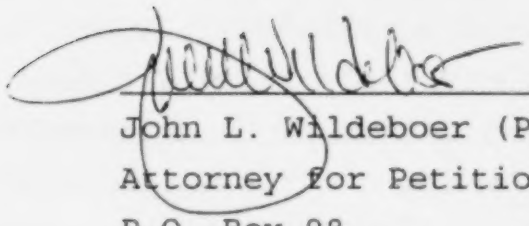

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Appendix A

STATE OF MICHIGAN
IN THE EIGHTEENTH JUDICIAL CIRCUIT COURT
(BAY COUNTY)

PEOPLE OF THE STATE OF MICHIGAN V. SHAWN MARCUS ENGLAND Defendant	FILE NO. 90-1196
PEOPLE OF THE STATE OF MICHIGAN V. LU ANNE SZENAY Defendant.	FILE NO. 90-1270

JURY TRIAL - VOLUME VII OF XVII
BEFORE THE HONORABLE WILLIAM J. CAPRATHE, CIRCUIT JUDGE

Bay City Michigan, Tuesday December 18, 1990

APPEARANCES: FOR THE PEOPLE:	TIMOTHY J. KELLY P36209 504 Bay County Building Bay City, MI 48708 (517) 895-8577
FOR THE DEFENDANT ENGLAND:	THOMAS J. PLACHTA P23705 117 S. University St. Mt. Pleasant, MI 48858 (517) 773-5900

[Excerpt beginning at page 135]

they will affirm or they will deny leave and if they do either, it won't disturb what we're doing here. So I'm going to allow the prosecutor to proceed in the order he wishes.

MR. HATCHETT: Your Honor, he's gonna bring in--ah--is it Belmont now?

MR. KELLY: Yes.

MR. HATCHETT: Okay, now I've been given to understand that in the statement of Shawn England or a statement that's attributed to Shawn through the witness Belmont, there are going to be some uhm--uhm--uhm-- assertions, you know, made by Shawn that would be implicating as to my client. Now, you know, we've got the--now it's time to, you know, to cross that bridge, Judge, and I--I take a position that nothing of what he says that my client's role may have been in this thing is admissible. And I don't wanta have to jump up and object to it in the presence of the jury. I thought that we were gonna get, you know, we were gonna have a--a record made on this before any witness was offered to the--to the jury so that we redact what has to be redacted and the witnesses can be given specific instructions by you as to what they can and can-

not say. But you see, once that bomb is dropped by a witness, you know, it's impossible for you to cure it. So I'm just as [135] a matter of precaution, suggesting, Judge, that if he anticipates this witness giving testimony that will suggest that Shawn England said something regarding my client's role, we need to deal with it now.

THE COURT: Mr. Kelly.

MR. KELLY: Well, we certainly do anticipate and we would want to have the witness testify - Mr. Belmont and also Detective Harken - testify as to what Shawn England told them about LuAnne Szenay's involvement. I have prepared a memo--memorandum of law regarding those statements that I have provided to the Court. I don't know if everyone has had a chance to read it, but the case law is clear that the prosecution is able to do that, even though Bruton --People or the -- the Bruton versus U.S., the original thinking was that a codefendant's statements couldn't be used against another codefendant. There has been ample case law and some real recent case law in the state of Michigan that has dealt with that particular problem and the Court does an analysis in People versus Watkins at 178 Mich App 441 (1989) and Peo-

ple versus Spinks, 184 Mich App 559 (1990). The Court has looked at the potential problem that's presented and wants to make sure that there is enough information in there, enough indicia of reliability of the statements to let them in as a statement against a [137] person's penal interest.

Also, if the statement is made such that it does not tend to exonerate the person making it or lay all the blame on the - the other person involved, those are also indicia of reliability and also there are other indicia of reliability that being the other evidence in the case. And we've done a lengthy analysis in our memo which indicates that under those cases and under the rule of evidence that states that it's a statement against a person's penal interest, that it's an exception to the hearsay rule and those statements would come in.

So we would ask that we lo--be allowed to--to bring in that evidence because we have, I believe we've laid out the case law, we've laid out the rules of evidence which--which allow that particular type of evidence to come in against the codefendant.

THE COURT: Okay, I thought though that we were gonna deal with this prior

to the witness testifying and that you'd bring it to the Court's attention. I'm wondering why it was Mr. Hatchett that had to bring it to my attention.

MR. KELLY: The--I--I informed the attorneys that my next witness was Mr. Belmont. Uhm, maybe I didn't say enough. I apologize for not saying Mr. Belmont will say X, Y. and Z. I thought counsel knew that's what his [137] purpose was for testifying. I also told 'em that we were calling Mr. Harken this afternoon and I believe both counsel realize that Shawn England gave a statement to Detective Harken

But Mr. Belmont is one of the people we had to fly up from Florida and he has to go on a return flight, I think it's tonight, so--

THE COURT: They--they probably knew, but I didn't.

MR. KELLY: Okay, I apologize to the Court. I--that was my mistake and maybe I read more into it than I should have. I didn't mean to do that in any way to mislead the Court and not tell the Court. That's my--that's my fault.

THE COURT: Mr. Hatchet?

MR. HATCHETT: Your Honor, I'm not even concerned about the substance of the statement and ah--and uhm--uhm--and I

don't know what they're gonna say and I don't care, you see.

All saying is that the rules absolutely forbid and prohibit him from permitting that witness to testify as to what my client's role may have been in this alleged conspiracy based upon these--a statement made to him by Shawn England. Now, Judge, and I st--I have, you know, I say this with all due respect, if you let this testimony in, I might as well go on home and my client might as [138] well just go on to the penitentiary, you see, because there's no way that you can cure it, you cannot give any kind of limiting instruction. That testimony is a damming as any testimony can possible be.

Now we're gonna have to deal with the testimony of Jim Blau based upon things that occurred between Jim Blau and my client. I'm gonn--I'm prepared to deal with that, but I'm not prepared to deal with second party and third party hearsay and there is no case, no case, Judge, that makes that kind of testimony admissible under these circumstances. The cases that he cites, why those are inter-related confessions, Judge, con--confessions that have admitted against both defendants in the same trial

and they're--they're cross confessions. You see, and clearly those kind of circumstances are distinguishable from the case at bar.

Bruton says no, you see, because this turns upon a Sixth Amendment right that every defendant before the bar of criminal justice has to confront witnesses. How can I confront that witness? I can't. And Judge, if you let it in, it's--it's over. And see that just give my client a free ride cause just as sure you let it in and--and this case ends for my client, it's coming back here because, you see, there's no precedent--and I'm shocked that the prosecution with the case that he has would he [139] even ask you to, you know, to offer--to admit testimony like this. You know, he doesn't need to do that. And that just takes a chance and when you're talking abut money, Judge, I mean, now's the time to consider what this is going to cost the taxpayer.

See, this is the--a--clearly an excessive effort on the part of the prosecution to sustain a conviction and all he's gotta do is stick to his case and he's got a chance to convict. But he wants you, Judge, to convict 'em just by breaking the rules, by ignoring **Bruton** and

trying to apply Watkins which clearly does not apply here. My client is not taking the stand. They don't have a confession from my client. And I—I defy anyone, Judge, to—to make this case as it presently is postured, you see, analogous to any case on record in which a confession like that has been admissible against a codefendant. There is no such case. And Bruton, 1968, Judge, is still the rule.

THE COURT: Mr. Kelly?

MR. KELLY: I believe, your Honor, that we have outlined and I don't if the Court wants me to go through my—my whole memorandum, I mean, I think we've shown under the case law, under Watkins and Spinks that these statements made by Mr. England to Mr. Belmont which would implicate LuAnne Szenay meet the test under those two [140] cases. He does not try to exonerate himself. He does not try to lay all the blame on Ms. Szenay. He shares the responsibility for it. He indicates to this witness how the full case occurred, how the events transpired. This was prior to Mr. England being arrested by the authorities which certainly would be a—a statement against his—his penal interest when you're in—involving yourself in a homicide by—by your own state-

ments, you're making statements such that you're—you have opened yourself up for those particular and those potential problems.

I don't know really what else to—to argue to the Court. If the Court wants to take a moment to—to read that memo, maybe we could do that if—if—it—rather than me just repeating everything that's in it.

MR. HATCHETT: Ju—ah—ah—Judge, you had—I'm sure if you've looked at it from a cursory position, you're capable of ruling on this and, you see, when he talks about 804, you know, a statement against somebody's penal int—Judge, that doesn't even apply. You see, the statement is hearsay, hearsay, hearsay anyway. I mean forget Bruton. It's just a hearsay state—and then he said well, it's a - it's exceptional to the hearsay rule because it's a statement—a statement against his penal interest. Well, it's not being admitted against him, [141] Judge, it's being admitted against my client. How can he make a statement against my client's penal interest that's exceptional to the hearsay rule? It doesn't make sense.

And, Judge, I'm not gonna say anymore because see, if you wanta admit the statement, let it in. And I--and I prom-

ise that, you know, I'm gonna sit quietly and abide it, but I promise you too that we'll be back. And see anybody who knows anything about criminal jurisprudence knows that this is reversible error, Judge, from the--peremptorily.

THE COURT: Anything further?

MR. KELLY: Briefly. It's--I'm hearing counsel's argument that it's a hearsay within a hearsay problem and that's also addressed in my memo. If--if each prong of the hearsay can be looked at either there's an exception or an exclusion to the hearsay rule, then that statement or those statements can come in and our position is we have met both prongs.

First of all, the prong that it's a statement against penal interest; and secondly, the prong of the statements of and in furtherance of statement during and in the furtherance of the conspiracy between Jim and--and Shawn about the involvement of Ms. Szenay. And we think that we've met, we'd be able to meet those two prongs [142] and, therefore, the--even though it's a hearsay within a hearsay problem, if each part of the hearsay can be looked at separately and can fall within an exclusion or an exception to the hearsay rule, then the--the statements can come in.

THE COURT: The first prong, the hearsay with respect to Shawn, you're saying is his--the statement against interest--

MR. KELLY: Right.

THE COURT: --or the--and then-

MR. KELLY: And it's--and also-

THE COURT: What's the other one?

MR. KELLY: --a party admission.

THE COURT: What's the other-

MR. KELLY: It's also a party admission-

THE COURT: --exception?

MR. KELLY: --and then you-

THE COURT: Pardon?

MR. KELLY: It's also a party admission beyond that-

THE COURT: Yea, but what's the other one?

MR. KELLY: --but the other one is the--the statements made during the course and in the furtherance of the conspiracy on independent proof of the--of the conspiracy which I believe the statements to Mr. Belmont [143] included references to how he and Jim had planned and worked this out with Mrs. Szenay as to her involvement in--in the homicide.

MR. HATCHETT: Judge, let me just say this and then I'm through with it. I--I wanta be sure that I accurately perceive,

you know, the basis upon which, you know, the prosecution seeks to admit this testimony. Now, if he wants to use 802 (d) (2) (E)--is that it?

MR. KELLY: Yes.

MR. HATCHETT: Judge, 801-

MR. KELLY: One of 'em.

MR. HATCHETT: --okay. 801 (d) (2) (E) doesn't apply, and ah--and--and--you see, because first of all, if it's a statement that he offers under 801 (d) (2) (E), it has to be a statement made during the course of and in furtherance of the conspiracy.

It is the statements made to somebody after the conspiracy has come to rest. You see, he's talking--the statement made to the police is a confession. The statement that was made to anybody else was just a statement after the fact, Judge, so I mean, clearly it is the--is not--it's not covered by 802 (d) (2) (E); and even if it was, Judge, you see, there has been no independent proof of the conspiracy yet.

And I don't really want to dwell on that aspect of [144] it, you see, but because you have discretion when it comes to admitting testimony re-involving somebody's role in the conspiracy to admit it subject to connection later on under Peo-

ple versus Vincent and People versus Enright I mean United States versus Enright, you know, th--you have a quathera (sic) of--of avenues that you can pursue in order to take the testimony subject to striking it later.

Up--you--you're fair minded, Judge, you say no, prove the conspiracy first, give me a prima facie showing that a conspiracy exists now before I admit anything with respect to somebody's involvement in the conspiracy. You cannot make a conspiracy out of the mouths of one of the co-conspirators. That's why the rule with respect to 801 (d) (2) (E), you know, it--is--is subject to that condition. You can't make a conspiracy out of the mouth of the co-conspirator. And you see, that's what he seeks to do.

But even if that were not the rule, Judge, the statement that he--that he seeks to offer is inadmissible in any case because he can't satisfy the other requirements. And then when he talks about a statement against penal interest as being exceptional to the hearsay rule under 804, Judge, every confession, Judge, is a--is a--is an--a statement against penal interest, [145] you see. So we would not have needed Bruton. We bet--the United States Supreme Court

never would have had to consider a man's right to confrontation under the Sixth Amendment if the only consideration involved was whether it was a statement against somebody's penal interest.

That's what every confession is. That's the very nature of it. He confesses his culpability and involvement in the commission of a criminal offense. So by its very nature, that's what it is.

Now he says, well, it's a confession so it's admissible against my client as a statement against his penal interest. Well, Judge, can you see how ridiculous that is. And--but more importantedly, why would he even try. I mean, here we are halfway down the road in a trial, and you--and to offer this into the record, Judge, is just to invite calamity.

THE COURT: I don't see how it's a conspiracy exception and--and maybe I'm not understanding you. You're saying that Shawn's statement to Mr. Harken or Detective Harken and to—

MR. KELLY: Mr. Belmont.

THE COURT: --Mr. Belmont, that is

MR. KELLY: That there--

THE COURT: --part of a conspiracy.

[146]

MR. KELLY: --there--there is also a conspiracy that is not charged here

between Jim Blau and Shawn England. The two of them worked together in concert to commit this crime at the behest of LuAnne Szenay. Now there are statements made during Mr. England's statements to both Mr--Mr. Belmont and to Detective Harken about the statements made in that conspiracy by--between the two of them - what they were supposed to do, who was supposed to do what, where they were going. Those are statements made during the furtherance of and in the course of the conspiracy on independent proof because the--the witness is, if you look at it as Shawn England, testifying about statements made during the conspiracy. He's--he's making those statements about what had happened during the conspiracies.

THE COURT: You're not--you're saying it's not the statement that's made to Belmont or to Harken that's the--it's--it's reference in that statement to a conspiratorial statement made earlier that you're saying is admissible.

MR. KELLY: Right. Right. That's where that--that's where--you have to lo--you have to take it a step back to see that those were made that--that evening or just prior to those statements were made as to who did what, where to go

and what to do. Otherwise, you know, [147] there is--you--you wouldn't get much, if any, of the--the confession in against Mr. England---

MR. HATCHETT: Well, Judge-

MR. KELLY: --unless there, I don't--I don't know how you could redact portions of the--the statements. One is--one is a tape recorded conversation with Mr.--with Mr. England by the police, part of his confession is tape recorded.

MR. HATCHETT: Judge, on that rationale, you see, and I--I know what he said and I know how diametrically opposed it is to all of the case law and rules of evidence, if you are prepared to accept that, then admit it.

THE COURT: Well, I've gotta read these cases first--

MR. HATCHETT: Okay.

THE COURT: --frankly-

MR. HATCHETT: Okay.

THE COURT: --the problem I have is if I would have known that this was coming now, I would have read this stuff during the lunch break. That was why I was disappointed that you didn't raise it, Mr. Kelly

MR. KELLY: I--I-

THE COURT: --telling-

MR. KELLY: --apologize, your Honor.

[148]

THE COURT: --me that it was coming this afternoon because I didn't even look at this memorandum because I didn't know--I thought maybe tomorrow or the next day that it would be coming. But in any event, I'm gonna have to take a break and read these cases because I'm just not familiar with them and I haven't had this issue in a long time and these cases are subsequent to when I've had the issue before.

All right. So the Court'll take a recess and you might wanta take the smokers down. Tell 'em we had a prolonged delay and you can take the smokers downstairs.

The Court 'll be in recess.

(Court in Recess at 2:26 p.m)

(Court Reconvened at 2:55 p.m.)

THE COURT: Counsel approach the bench. (Bench conference at 2:55 p.m.)

(Bench conference concluded at 3:00 p.m.)

THE COURT: Okay. Let's take a look at the cases that have been cited. The oldest of the two cases is People versus Watkins and on page 446 of Watkins, the Court said that--let me start with Spinks because Spinks talks about Watkins and I

think that helps us to understand it a little bit better because they make reference to it. Spinks is 184 Michigan Appeals 559, a 1990 case, this past March, and the Court stated on Page [149] 565:

> "In Watkins,"…referring to the case that I was talking about before…"This Court stated that there is now a statement against penal interest exception to the hearsay rule, MRE 804 (b)(3),which would make such a statement admissible in a Bruton context. This Court notes, however, that subsequent U.S. Supreme Court case placed the added requirement that a codefendant's statement must bear adequate indicia of reliability. The court in Watkins found that the confessions of the two codefendants were identical in all material respects. The codefendants did not, in their confessions, distort the facts for their own benefit, or to the detriment of their codefendants. They did not try to exonerate themselves and they accurately described the events in question. The confessions were corroborated

by evidence which was property admitted and, therefore, the Court concluded that the two confessions born sufficient indicia of reliability to overcome the presumption against their admission into evidence."

And it happens that in both Spinks and Watkins there were two confessions and that's a factor that we don't have in the present case. We don't have two confessions. But [150] the mere fact that we don't have those two confessions doesn't mean that the principles in Watkins and Spinks don't apply because as the Court said, there is the MRE 40--804 (b) (3) exception to the hearsay rule that applies in the Bruton context.

However, the Supreme Court has held that there has to be an added--or an adequate indicia of reliability. In other words, just the fact that it's a 804 (b) (3) exception which gives it the reliability of the fact that it's a statement against the penal interest of the individual making it, is not enough in the context of Bruton. There has to be a sufficient added--there's an added requirement that the codefendants statement bear an adequate indicia of reliability.

And when we look at the factors in Watkins as I just stated them in Spinks, the Watkins ca--case said on page 446:

> "Jordan and Miller's confessions were corroborated by the testimony of Payne and Wilbert. Police officers testified that they counted nineteen bullet holes in Wilbert's car and recovered twenty-three fired cartridge cases from the scene of the shooting. An expert in firearms and firearms identification -testified that, based on his analysis of the cases and the bullets that were recovered [151] from Jordan's body, at least three guns were used in the shooting. "
>
> "Jordan's and Miller's confessions were identical in all material respects. The record does not indicate that they distorted the facts for their own benefit or to the detriment of their codefendants. They did not attempt to exonerate themselves. The record indicates that they accurately described the kidnapping and shooting. Their confessions were corrobo-

> rated by evidence which was properly admitted against defendants at their trial. Therefore, we conclude that Jordan's and Miller's confessions bore sufficient indicia of reliability to overcome the presumption against their admission into evidence."

So that there is a presumption against the admission and I'm going to now call upon the prosecutor to state for the record what the indicia of reliability are that he's relying on with respect to the statements in the present case.

MR. KELLY: Thank you, your Honor. If I may, I'm going to refer to the copy of Mr. Belmont's statement that was prepared down in Florida and sent up to Michigan. He indicates when he tells the officers about Shawn England's involvement he starts at the beginning and describes Shawn and how he knew Shawn from school. [152]

He started testif--or talking to the officers, he said:

> Shawn was receiving an inheritance from his uncle who had died up in Michigan. It was gonna be anywhere from fifteen to thirty thou-

sand dollars and all of our problems were going to be over.

They were gonna get matching cars and what not. The ah--Shawn continued to talk about this, they--apparently they were out consuming some alcoholic beverages this--this evening and Shawn indicated:

"I can't keep this from you guys, I can't keep this from you, I gotta tell, I've gotta tell you." And then he related to Mr. Belmont, there was this lady from Michigan - never mentioned her name, supposedly he had never met this lady. Jim was the person that met the lady. Jim was involved as he guessed as security or something like that at this place this lady was staying when he came down to Florida. He was familiar with her and the lady was having problems with her husband so Jim kept--kept just saying to him, you know, why don't you just knock him off, just knock him, just knock him off. This guy told me that later on. I guess the lady took him seriously

and asked Jim if he knew anybody who could knock him and Jim said, yea, and they talked about money and supposedly it was supposed to be [153] thirty thousand dollars that they were supposed to receive after this guy had died. So Jim approached Shawn about it and Shawn was in dire straits financially at that time. He was--at the time he was staying--sometimes stayed at Mr. Belmont's house and some other people's houses. He goes on to say, Jim had flown out to Michigan before him and he had flown up, referring to Shawn, you know, after Jim and Jim was keeping surveillance on this guy and getting his habits and what not - where he was going and following him around. So after Shawn got up there, he had bought a shotgun and they gotten, I think it was a Camero, a '77, '78, or '79, you know, late '70's model Camero. He told me it was like a yellowish, a beige sort of like the color of this wall, a little bit more yellow. The statement goes on, they had followed this guy around for

three days and eventually got to a situation where it was at night and the guy was alone in the house so Jim and Shawn decided that that was the opportune moment to end this guy's life. They went up to the guy's door, knocked on the door, forced their way inside so the guy saw the shotgun. He got scared, turned around and tried to run away and Shawn raised the shotgun and shot the guy in the back. The guy was [154] still fighting for his life and tried to reach for a window. Jim went around, got the guy, I guess around the waist or whatever, by the short, tore the guy around and as Shawn puts it - begging like a pig for his life - and he shot the guy, shot the guy in the head and then shot him three more times and then they had left and Jim was left with the responsibility of getting rid of the car and getting rid of the shotgun and he, referring to Shawn, flew back down.

Uhm, there are some indicators later on.

The specific things about the shooting that Shawn said was when the guy turned around to run, he meaning Shawn, shot the guy in the back and the guy still kept going through the window as he was trying I guess to climb out the window or something, and Jim had grabbed him around the waist or grabbed him around the midsection and swung around and the guy was begging for his life and begging for his life and he just went up to the guy's head and put the shotgun in to his shoulder and then shot--and then shot and the guy fell and on his--shot the guy three more times to make sure that he was successful in killing him and ah--and then they fled. And, according to Shawn, he was not aware of what had [155] happened to the ca--the gun after--after the fact that they had - Shawn had indicated to Mr. Belmont the--they had the wrong description, referring to the po--the people in Michigan of the car and they had the totally wrong car and all this. Supposedly witnesses had saw the

car fleeing, had given them the wrong description and they were way off and they didn't have anything to worry about. And he also indicated he didn't know where the shotgun had ended up.

Basically, I think that's the People would indicate to the Court that are indicia of reliability of--of that particular statement.

THE COURT: Well, how are they an indicia of reliability?

MR. KELLY: They, so far as the case has been presented and we intend to also present other proofs including the test--the testimony of James Blau, that will corroborate almost word for word the way that James Blau indicates that the--the murder occurred. In addition to that, you have the physical evidence in the case which indicates there was a shooting at the house, there was a shotgun used, there was--there was evidence by the--the neighbors of a car, a light color car, late model '70's car leaving from the scene. There's evidence [156] at the home that the--the physical evidence at the home through the pictures, that the victim had been trying to go out the window. There's evidence of a forced entry of the front door which is

indicated in this statement which we also expect Mr. Blau to testify that there was in fact such--such happened. And we fell that all--would all be corroborated by the other evidence that has already been presented and will be presented as the case unfolds.

THE COURT: Mr. Plachta?

MR. PLACHTA: (No verbal response)

THE COURT: Mr. Hatchett?

MR. HATCHETT: Judge, the things that disturbs me more than anything else about this proposal is how is perverts, you know, the hearsay rule and how it is the most egregious violation of Bruton, including the dissenting opinion from which this rationale comes, that I have ever even seen, dreamed, or contemplated.

Now Bruton, Judge, had a dissent in it. And in the Bruton dissent, consideration was given to 804 or to a comparable Federal hearsay rule, and the Court in the dissenting opinion em--em--embarked upon the question of well, what--what are we doing here, I mean, what is the majority doing? The majority is taking the position that this testimony is not admissible, you know, based upon the inability of the person against whom it is being [157] admitting to cross examine, you see, the part--the declarant.

And--and they say, well, that's--that's well and good, but there is another issue that's involved and--and the issue is more fundamental than the so-called hearsay rule. And that issue is the issue upon which the hearsay rule was predicated from the very inception of it, that is whether or not you can test it, whether or not it is reliable. And--and in fact, as a matter of--of--of--of--of fairness, the issue always is reliability.

We wouldn't need a hearsay rule no--this is--this is the dissenting opinion in Bruton, that we would never need a hearsay rule if we could be assured that the declaration, even though it be made out of court, is reliable. So they said, well, now if we can find a basis upon which we can assure that the testimony is reliable, then later for the hearsay rule. Then the hearsay rule should never be a preclusionary (sic) device that is interposed to take truthful testimony from a witness in the--in--in criminal jurisprudence.

Judge, there is not one Court anywhere that adopted that rationale and Bruton has been the rule of law in the United States Federal Courts since 1968 and the rule of law everywhere else. Now

in 1989 and 1990, the Court of [158] Appeals in Michigan seizes upon the dissent and says, well, yea, you know, we--we--we think that there is some merit to the dissenting view expressed in Bruton and we think this is an appropriate case to apply that rationale in. But, Judge, what we have here is like comparing apples and horses in Spinks and in Watkins.

Yo-- Watkins had to do with interlocking confessions. You got two defendants, in trial, and both of them confessed. And in order to determine whether or not the confessions, even though they violated the right under the Sixth Amendment, you see, wi--in order to determine whether or not they were reliable, they used the--the content of the confession to compare, to see whether or not it was--wheth-- whether-- whether there was a sufficient indicia of reliability to say, let it in. And when they made that assessment, Judge, they said, look she sa--or he said this, he said this, he said this, he said this, he said this, he said--look, they're talking about the same thing.

I mean, so clearly when you look at the content of the confessions themselves, there is nothing that any juris could do but to conclude that these are

reliable statements even though it violates Bruton, we're gonna let 'em in based upon the fact that they are reliable. We find that there is a sufficient indicia of reliability [159] based upon the statements themselves, you see, to say forget the hearsay rule.

And you know what they said, Judge, in Watkins? That he has not addressed it nor have you. They said that in this case when you have interlocking confessions, that error or the breach of Bruton by way of a denial of a right of confrontation under the Sixth Amendment is harmless error - harmless error. You see, that case held that it was error. It violated Bruton and it violated the right of a defendant under the Sixth Amendment to the Constitution of this country to admit such a statement. But they said, we're gonna admit it anyway because the reliability of it is just so perfect that even though it constitutes a violation, we find that it is a harmless violation.

Now how can they compare the claim of harmless error in Spinks and in Watkins to this case at bar? There is no comparison, Judge. That's like comparing an apple to an elephant. That's how egregious the error would be, Judge, if you let it in. Now he's given us an opportu-

nity to take a position that would not be so violative of my client's rights. He said, look, I'm prepared to take this man's testimony and redact that portion of it that relates to LuAnne Szenay. Judge, that's the better view. You see, that's--that's the only [160] way to do it. The--this would constitute the most egregious denial of a right to due process that I have seen in a long time and, you see, when it occurs generally, Judge, it occurs maliciously. You got some overzealous prosecutor and you've got a Judge who's hell-bent on s-s-stay (sic). That is not the case here.

Now I--I'm satisfied that the--the prosecution is doing more than what he needs to do, but that's--ah--ah--you know, sometimes that comes with the terr--and I'm satisfied that you are in as good faith as you can be but, Judge, you are as wrong as you can be if you let this confession in based upon the rationale of Spinks, Watkins, or indeed the dissent in Bruton.

We still have a Sixth Amendment to the Constitution, Judge, problem that we have not over--able to overcome and that you cannot--you cannot, Judge, alleviate the burden by claiming the content of the statement which is hearsay two times re-

moved here is a sufficient indicia of reliability to satisfy you that it's okay to violate the Sixth Amendment and right of confrontation and call it harmless error. It's error, I don't care how you look at it and the Court admitted it in Michigan. They said, we know it's error, but we find that it's harmless. You can't find that here, Judge. You can't find it here.

THE COURT: Anything further, Mr. Kelly?[161]

MR. KELLY: No, your Honor.

THE COURT: All right. I think that in Watkins what they said was that we recog--this is on page 447:

> "We recognize"...this--this is after the--the--let me read the previous sentence that says..."The lower court properly admitted the confessions as substantive evidence against codefendants. We recognize that this issue presents a close question. Therefore, we further conclude that in the context of this case, any Confrontation Clause violation which occurred was harmless."

So what they're saying is that we believe that it doesn't violate the confrontation

clause because they're saying that the lower was correct in admitting the confessions as substantive evidence against the defendants, but they recognize that someone else might--might disagree with them like the Supreme Court maybe and they wanted to shore up their decision it would appear to me by saying:

> "Therefore, we...conclude that in this context, any confrontation violation which occurred was harmless."

So I just think it was an alternative theory, harmless error in case we're wrong on the confrontation clause violation. But it's a close question. I--and I agree with them and I agree with--with counsel that it's a [162] close question.

Let's hear your argument on the next—the confession.

MR. KELLY: Okay. The argument on the confession, your Honor, is very, very similar. The problem that I would have in that case is that there is a transcribed statement and there's a taped statement that we intended to bring in as evidence against both defendants. And that would be if the Court were to rule that we could not bring in those statements, that would be virtually impossible to redact the portions that would need to be re-

dacted if the Court ruled that way because of the taped statement and because of the--the transcript that goes--goes along with it. I think it would leave very big gaps in the statement made by Mr. England to the officers when they--when they took his confession down in Florida.

But again, in his statement and he goes through--Mr. England goes through the whole scenario of how this murder took place, and how Jim Blau had hired him to come up to Michigan or had--wanted him to come up to Michigan to help him kill Tim Szenay, that there was going to be insurance money from LuAnne Szenay, that they were gonna split the proceeds, that the two of them went looking for Timothy Szenay the day of the homicide, went to Timothy [163] Szenay's sister's home looking for Tim, called LuAnne Szenay on the telephone, James had called LuAnne Szenay on the telephone to get directions, a map was given, a photograph was given--given to the--Mr. Blau who in turn with Mr. England used that to try to find Timothy Szenay.

It also goes through in--in graphic detail of how the murder occurred, how they went up to the home at 195 Rivertrail Drive, that Shawn indicates that

when he was out by the window that Mr. Szenay knew something was up, new that there--he had like the sixth sense that--that somebody was out there, Shawn fired a shot, missed Mr. Szenay who had started to get off his couch or run. He then in turn ran around the house. James Blau had broken in the door and chased Mr. Szenay in to the kitchen. Mr. Blau pulled Mr. Szenay out of--from the window where he was trying to escape from the house. He was begging for his life and there was a conversation between he and Jim, you know, just do it. At that point, Mr. England fired a couple of shots killing Mr. Szenay - one in the back and then one in the neck.

There's also indications - he drew the officers a map of the--the ah--the house or a diagram of the house during their interview with him, indicated that money--he had gotten some money, he had been flown up by James Blau, that money had come from LuAnne Szenay and there [164] was--there was supposed to be money coming down after the fact from LuAnne Szenay, all of which in--in addition that they've--they have this car that they used. They used a shotgun during the slaying, that they had taken off after the slaying, went back to the Round Up

Bar in--in Midland which we have evidence of already. We have evidence that there was a shotgun used, evidence a shotgun was purchased by Mr. England.

There is also going to be the testimony of James Blau which will pretty much go step for step with Mr. England about his arrival in Michigan, the--the reason for his arrival in Michigan, how those arrangements were made to come up to Michigan, to fly up, to do the--to do the murder, how they looked for Timothy Szenay on the day of the homicide, how they couldn't make contact, how they the two of them went to the sister, the sister of Tim Szenay in Bay City looking for Tim Szenay, finding his car there but Tim not there, how they had made arrangements with LuAnne Szenay as to how this murder was to take place and then the murder itself, the shooting out at the house, how Jim Blau had knocked the door in after Shawn had taken the first shot and--and he had pulled Mr. Szenay out of the window, pulled him down and then Shawn England firing the fatal shots and two of them fleeing the scene, going back to--to Midland to the Round [165] Up Bar.

There's also an indication in Mr. England's statement how he had gone back to the motel after the--after the murder

and burned the--the--the map that was given to them and the photograph that was given to them to identify Mr. Szenay. There were just numerous items which are corroborative of his statement which are indicators of reliability and--and--and there's no indication anywhere in this statement of trying to exonerate himself. He implicates himself throughout, does not try to shift the blame over to other people. He gives the blame to the people he feels are involved being James Blau and LuAnne Szenay and also takes full credit for his involvement in that particular offense.

I think in a nutshell will show the indicia of reliability of that statement. We feel that in that particular instance, that full statement - I don't know that there's really a way to practically redact portions of that particular statement because we feel that the jury should hear Mr.--Mr. England's--his words. We have it on tape and they should be able to hear what he has to say and we feel that we've met the--the burden under Watkins and Spinks and Bruton.

THE COURT: Mr. Hatchett.

MR. HATCHETT: Your Honor, I--I have a, you know, [166] what amounts to a constitutional justercia (sic) problem. I

don't have standing, you see, to invoke the rule of law that would be applicable to the statement that was given by Shawn England to the police. And I'm satisfied that his counsel has adequately covered that although I have--instincts tell me, you know, to argue it anyway because the prosecution would be on much firmer ground if they sought to use the other statement as opposed to the statement that they claim that he gave to the police. It bears every kind of prohibition against the statement that was given to the police by his lawyer, through his lawyer because that violates his right you see, to counsel. And the, you know, the latest case that came down and you're as familiar with it as I am, clearly indicates that that confession, if you please, given to a law enforcement officer is inadmissible.

But be that as it may, when we're dealing with a statement involving some private citizen, you don't have to deal with, you know, the--the safeguards as promulgated by Escabito (sic) and all of the progeny of Escabito right down to the latest Mississippi case. So if we're gonna argue it, Judge, I'd almost be willing to argue it in the context of--of whether or not the statement by the pri-

vate citizen is admissible. And I think they're analogous other than the fact that one was [167] given to a law enforcement agency in which safeguards apply that did not, that were not granted; and another one was just simply given.

But, Judge, if you--if you--if you compare the two statements, they're essentially the same. What he is saying is that I did this, I did it with Jim Blau, and Jim Blau tells me that he was doing it because LuAnne was paying him to do it. Now what we have, Judge, is hearsay two steps removed. You see, that's not addressed in Watkins and it's not addressed in Spinks. And see, Bruton never contemplated that. It--it would be different and even though it would--I'm not prepared to sug--to suggest that it would be admissible if Jim Blau was occupying my client's seat as a defendant. And then he would be talking about in that statement things that they did together, you see, I saw Jim do this, Jim told me to do this, I did this, we did that. That's another issue. You see, at least we--we removed one barrier. But see, what he's saying, Judge, is that--and he--and he's offering it as evidence against my client that Jim Blau and I did this, that, and the other things, and although he admit-

tedly has never seen or talked to my client, that Jim Blau told me that he was being inspired to do it by money that had been offered by my client.

Well, Judge, you know ho--what that is. That's just [168] outrageous. I mean, that--that--that violates ever rule, not only of evidence, Judge, but I mean, it--rule of decency. I mean, how can anybody defend a case and not--not considering the fact that it's a capital offense, but how can you expect anybody to defend a case when the--the evidence is coming from the mouth of somebody who had no contact with her whatsoever. And he's talking about what somebody told him my client's role was.

Judge, that's--it's impossible. You see, I have no way of defending that. And you see, you can take it one step further and there would be no difference and you could not make any distinction wi--if you're prepared to admit this than testimony, he could say that he and Jim Blau did this, he and Jim Blau did that, all of it was inspired by Jim Blau's declaration that he was inspired by promises of money from my client and my client had indicated to Jim Blau that she was getting the money from John and John indicated to her, who indicated to Jim Blau,

who indi--indicated it to me that he was getting the money from the Judge's son. It's all the same.

How am I gonna cross examine on that? I mean, what chance does she have if you're gonna let evidence in to her trial like that? And not only can I not cross examine him, you see, I can't cross examine anybody. I [169] mean, that's the most damming evidence that you can offer. You know, that's--that's the evidence that this jury is waiting to hear of my client's involvement and--and it puts me in a position that they're hanging--Judge, and I am as powerless as a child to do anything about it - powerless.

I can't cross examine the police on what Jim Blau told him cause I'm not even getting it from him. I'm not even getting it--I'm not even getting it from the person that Jim Blau gave it to. I'm getting it from another person who told it to the police. Judge, impossible, you see, so that's the evidentiary quagmire that we are in, Judge, and see, instinct have to tell you, you know, particularly and I - forgive the personal reference, but Judge, particularly in light of the background from which you hail. You see, I know your instincts are good. And see

your instincts have to tell you no. If you didn't know anything about the law or constitution, which you do, but even if you didn't, Judge, your instincts would demand no, no, this is not the way to try anyone because when you do it that way, you've taken from her me, and I'm a lawyer. I'm the one who co--committed to protecting her and seeing to it that the rules are applied and I've been relegated to a position of utter helplessness and hopelessness.[170]

THE COURT: All right. Anything further, Mr. Kelly?

MR. KELLY: No, your Honor.

THE COURT: All right. As I indicated before, in--in People versus Spinks, they enunciate the rule from Watkins and the rule is that a statement against penal interest, exception to the hearsay rule, would make a statement admissible in the Bruton context if in view of the other United States Supreme Court cases there was an added requirement that a codefendant's statement bore sufficient or adequate indicia of reliability. So that's the question that I think I'm faced with in view of Watkins and Spinks. I admit that for years under Bruton there was no question about codefendant's confessions not coming in when the codefendant didn't

testify because it precluded the attorney for the person that the confession

MR. PLACHTA: Judge, I apologize for interrupting.

THE COURT: Yes.

MR. PLACHTA: I would never do this. I've never done it

THE COURT: No problem-

MR. PLACHTA: --before.

THE COURT: --what's the problem?

MR. PLACHTA: My investigator is attempting to talk with Stanley Belmont and the police are interfering with [171]

* * * *

[Commencing again on page 175]

THE COURT: --objection to it.

MR. KELLY: --with it.

THE COURT: All right.

MR. PLACHTA: Thank you, your Honor.

THE COURT: All right. Then along came Watkins and Spinks and regardless of the instincts that we have built up and have developed as a result of Bruton and in-have been experiencing, they throw a different light on Bruton and on how it applies in Michigan and that's the law that the case has available to it to follow in Michigan. And that may not end up

being the law if the Supreme Courts decides--if the Supreme Court decides that something is different, but that's the law I have to apply in this case and it doesn't appear to me that it would be fundamentally unfair. What it says is is that confessions really can be used when they implicate a codefendant when the statement that's made is against the penal interest and there are other separate instances of indicia of reliability that can be gleaned from the remainder of the case and can be articulated.

And I think Mr. Kelly's articulated them in both instances that the statements are consistent with what the testimony of Blau, substantially, they're not gonna be in every respect, but they're consistent with other evidence in the case that we already had and that [175] we're going to be having such as the shotgun and the--the--the--the directions and the location and the movement in the house and the other evidence in the case so that it would appear to me that although this isn't a codefendants confession that's being used against each other, it's similar in that there's a defend--there is a person who's not a codefendant but is still a defendant testifying. And there is a consistency between

his testimony and the confession of Mr. England, at least they're substantially consistent; and the--also there is a consistency between the statement to Mr. Belmont and the testimony of Mr. Blau and the confession of Mr. England; and there is a consistency in the statements and the confessions with the evidence that is being independently offered with respect to the factors in the confession. And the exception which are two, is one, the already referred to statement against penal interest be--and the unavailable nature of the situation because the witness is not gonna be--the codefendant is not gonna be testifying. And then you have the conspiracy exception that--that is being talked about to both the private witness and in the confession to the officer are statements that--and activities, etcetera, that were part of the conspiracy which really was involved between both Mr. England and Mr. Blau and Mr. Blau and Ms. Szenay. At [176] least as they're alleged to have occurred and are established by other evidence in the case than merely those particular statements; and therefore, the Court believes that they are admissible under those cases and overrules the objection to them.

All right. Anything further, Mr. Kelly?

MR. KELLY: The only thing I'm--I'm going to do, your Honor, is I'm just--with--just--even though I appreciate the Court's ruling, I'm going to - with Mr. Belmont, I'm going to steer clear of those particular areas involving Mrs. Szenay's statements. I think on the tape I can't get around it so I'm--I'm just gonna--I'm gonna go it that way. I appreciate, I really--I appreciate the Court's ruling. I think it's proper, but I just--I wanta just proceed with the witness that way.

THE COURT: So you're going to indicate to the witness and you want me to indicate to the witness prior to the witness' testimony not to get into anything with respect to Ms. Szenay?

MR. KELLY: Yes.

THE COURT: That's the witness Belmont?

MR. KELLY: Yes.

THE COURT: All right. Anything further, Mr. .Plachta?

MR. PLACHTA: No, your Honor.

[177]

Appendix B

State of Michigan
18th Judicial Circuit
County
ORI
MI-090015J

JUDGMENT OF SENTENCE COMMITMENT TO CORRECTIONS DEPARTMENT

CASE NO. 90-1270-FC-C

Court address
515 Center Avenue, Bay CityMI 48708,
Court telephone no.
892-3528

THE PEOPLE OF THE STATE OF MICHIGAN V Lu Anne Szenay

Ctn:099000101001
SID: Not Given
DOB: 6/7/57

Prosecuting Attorney:
George Mullison

Defendant attorney name:
Elbert L. Hatchett
Bar no. 14735

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 1/10/91 of the crimes stated below:

Count	Convicted by: Plea	Court	Jury	Charge Code(s) MCL Citation/PACC Code	
1			G	[Note 1]	750.31 6-A
[Note 1] 1st. Degree Premediated Murder					
2			G	[Note 2]	750.31 6-A(C)
[Note 2] Conspiracy to Commit 1st Degree Premeditated Murder					

2. The conviction is reportable to the Secretary of State under MCL 257.732. The defendant's driver's license number is:_____

IT IS ORDERED:

3. Defendant is sentenced to the custody of the Michigan Department of Correc-

tions as stated below. This sentence shall be immediately executed.

Count	Sentence Date	Minimum | Maximum	Begins	Credit	Other Information
1	2/19/91	Mandatory Life	2/19/91	272 days	[Note 3]
2	2/19/91	Mandatory Life	2/19/91	272 days	[Note 4]

Note 1: "This is a mandatory life sentence NOT PAROLABLE"

Note 2: "This is a mandatory life sentence PAROLABLE"

Defendant shall pay resttution of $_____

Court recommendation:

The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the departnment.

Date: 2/20/91 s/William J. Caprathe
Bar no. 11596

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michian State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(no signature)

(SEAL) Deputy Court Clerk

Appendix C

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SHAWN MARCUS ENGLAND,
Defendant-Appellant.

No. 138219:138272
LC No. 90-1196-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

LU ANNE SZENAY.
Defendant-Appellant.

No. 138992
LC No. 90-1270-FC

DEFENDANT'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR IN ADMITTING OVER DEFENSE OBJECTION THE CONFESSION OF THE CODEFENDANT, WHICH INCRIMINATED DEFENDANT LUANNE SZENAY, PARTICULARLY BECAUSE THE JUDGE RELIED UPON THE COURT OF APPEALS OPINION IN WATKINS, WHICH WAS LATER REVERSED BY THE SUPREME COURT?

Defendant-Appellant answers, "Yes..

II. WHERE DEFENDANT LUANNE SZENAY WAS TRIED FOR THE MURDER AT THE SAME TIME AS THE ALLEGED SHOOTER, SHAWN ENGLAND, AND WHERE JIM BLAU WAS A MAJOR PROSECUTION WITNESS WHO ADMITTED HIS PARTICIPATION IN THE MURDER, WAS SHE PREJUDICED AND DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR IN ADMITTING EVIDENCE THAT ENGLAND AND BLAU ESCAPED FROM THE COUNTY JAIL AND WERE RECAPTURED?

Defendant-Appellant answers, "Yes".

III. WHERE DEFENDANT LUANNE SZENAY WAS PREJUDICED BY ADMISSION AGAINST HER OF EVIDENCE THAT SHOULD ONLY HAVE BEEN ADMISSIBLE AGAINST HER CODEFENDANT, DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR IN DENYING THE DEFENSE MOTIONS TO SEVER THE TRIALS OF SZENAY AND HER CODEFENDANT?

Defendant-Appellant answers, "Yes..

IV. SHOULD DEFENDANT LUANNE SZENAY'S CONVICTIONS BE REVERSED BECAUSE OVER DEFENSE OBJECTION THE TRIAL JUDGE IMPROPERLY INSTRUCTED THE JURY ON THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT FROM THE LEGALLY INADEQUATE SECOND EDITION OF THE CRIMINAL JURY INSTRUCTIONS, INCLUDING INSTRUCTING THAT A REASONABLE DOUBT IS NOT A "POSSIBLE DOUBT" AND NOT INSTRUCTING THAT THE JURORS MUST FIND GUILT TO A MORAL CERTAINTY?

Defendant-Appellant answers, "Yes."

v

I. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN ADMITTING OVER DEFENSE OBJECTION THE CONFESSION OF THE CODEFENDANT, WHICH INCRIMINATED DEFENDANT LUANNE SZENAY, PARTICULARLY BECAUSE THE JUDGE RELIED UPON THE COURT OF APPEALS OPINION IN WATKINS, WHICH WAS LATER REVERSED BY THE SUPREME COURT.

A. FACTS

Shortly after he was arrested Codefendant Shawn England confessed to his participation in the murder of Timothy Szenay. He was still in Florida at the time, but confessed to Michigan State Police Detectives Robert Harken and John Overstreet. Most of the confession was taped. A transcript of the tape is included in the Appendix to this Brief.

Before Shawn England's confession was brought into evidence, Defendant LuAnne Szenay repeatedly objected to the admission of any statements by England as evidence against her, but the objections were overruled. T 12/4/90, p 11; T 12/18/90, pp 135-179;5

T 12/19/90, pp. 150-163, 192-195. The confession was crucial evidence against both LuAnne Szenay and Shawn England. In his opening statement and in closing arguments, the prosecutor emphasized the confession in arguing for conviction of both Shawn England and LuAnne Szenay. E.g., T 12/6/90, pp. 168; T 1/4/91, pp. 34, 49-50, 52, 167, 177-178, 180.

Defense counsel for LuAnne Szenay argued that Shawn England's statements that implicated Szenay were inadmissible. He

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Footnote 5 The first part of the discussion on December 18 concerned **statements Shawn England allegedly** made to Stanley Belmont at a party in Florida before his arrest. The prosecutor ultimately **decided to use Belmont's story** only as it incriminated England **and not to use any of Belmont's** statements concerning LuAnne Szenay. T 12/18/90, p 177.

[Page 16 Of Brief]

cited the rules against admitting hearsay, the constitutional right to confront witnesses, and Bruton .6 He argued that the hearsay exception for statements against penal interest, MRE 804(3), did not apply. T 12/18/90, pp 135-142, 157-161, 167-170, 178-179; T 12/19/90, pp 152-153, 159-161, 194-195.

Both the prosecutor and the trial Judge cited the Court of Appeals opinions in Watkins and Spinks in justifying the admission of England's statements as they related to LuAnne Szenay.7 T 12/18/90, pp 136, 149-152, 171; T 12/19/90, pp. 157, 162-163.' The judge said that the cases showed, "confessions really can be used when they implicate a codefendant when the statement that's made is against the penal interest and there are other separate instances of indicia of reliability ...- T 12/18/90, p 175.

State Police Detective-Sergeant Robert Harken testified that he and Detective John Overstreet interrogated Shawn England in Florida on March 3, 1990, the morning after his arrest. T 12/19/90, pp. 231-233. England waived his Miranda rights9 and said he was willing to talk. Id., at 232-235.

Shawn England told the detectives that Jim Blau stated that LuAnne Szenay would collect $300,000 in insurance and that Blau

Footnote 6 Bruton v United States, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968).

Footnote 7 People v Watkins, 178 Mich App 439; 444 NW2d 901 (1989), rev'd, 438 Mich 627; 475 NW2d 727 (1991); People v Spinks, 184 Mich App 559; 458 NW2d 899, lv den, 437 Mich 875 (1990).

Footnote 8 In addition, see Appendix for the prosecution's Memorandum of Law Regarding The Use of Shawn Marcus England's Statements Against Codefendant Lou Ann [sic] Szenay.

9 Miranda v Arizona, 384 US 436; 86 S Ct 1602; 15 L Ed 2d 694 (1966).

and England would get 10% of that, i.e., $30,000. T 12/19/90, p 251; T 12/21/90, pp. 12-13.

> "[H]e said that Jim Blau told him that LuAnne told him that if anything was to happen to LuAnne's husband, Tim Szenay, Jim Blau would be well taken care of and he mentioned the ten percent again. n T 12/19/90, pp 251-252.

Also, England "said that Jim was getting money from LuAnne before and after the homicide. "Id., at 252.

Codefendant England told the detectives that after the killing Jim Blau called LuAnne Szenay from the Roundup Bar. The next morning LuAnne Szenay called Jim Blau. T 12/19/90, p 253. According to England, Ms. Szenay said that Tim Szenay had been killed and was trying to make it sound as if she was surprising Blau, in case the telephone was tapped. Id., at 254; T 12/21/90, pp. 39-41.

During Detective Harken's testimony the tape of Shawn England's confession was played to the jury. T 12/19/90' pp. 255258. On the tape England referred to LuAnne Szenay many times. He said Jim Blau told him "that Louann Szaney [sic] wanted her husband dead for various reasons. That she would get a lot of money from it and that she'd be willing to give us some." Transcript, p 2. When Detective Overstreet asked how Blau and England found the house of Tim Szenay's sister-in-law during their attempts to find Tim, Shawn England said, "I believe Lou Ann told him how to get there. n Id., at 5. Also during their searching for Tim, "I believe he called Louann ... n Id.

Shawn England said that on Wednesday, January 17, Jim 81au called LuAnne Szenay from a McDonald'-: "I remember, he was not there calling her and ah, I guess it was to get some more money. [Page 18 of original.] Transcript, p 7. "[S]he had told him ... that she just wants it done and any

amount of money, it doesn't matter. She just wants it done." Id.

After describing the murder in detail, Shawn England said the money for his plane ticket back to Florida "was supposed to come from Louann. Jim said Louann was going to give him a thousand dollars, enough for me to get home and get to Florida." Transcript, p 15. While they were in Florida after the murder but before their arrest, Jim Blau told England, "Louann is going to send me some more money." Id. When Detective Overstreet asked where Jim Blau got his information about Tim Szenay, England responded, "Louann told Jim everything he knew about Tim. n Id., at 17.

During the instruction conference before closing arguments, defense counsel for LuAnne Szenay asked for the standard instruction that Shawn England's statements could not be used against her. The trial judge refused the request for LuAnne Szenay, but granted England's request for the corresponding instruction on any statements by Szenay. T 1/3/91, pp. 93-94; see CJI2d 4.1, 4.2.

The judge later instructed the Jury, "Defendant LuAnne Szenay's statements, if any, have been admitted as evidence only as to her. And they cannot be used against Shawn England, and you must not do so." T 1/8/91, p 16. Of course, since they were not given the corresponding instruction that England's statements could not be used against Szenay, the given instruction reemphasized to the jury that they could use England's confession against her.

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B. ARGUMENT

In admitting Shawn England's confession as evidence against LuAnne Szenay, the trial judge relied on the Court of Appeals opinions in Watkins and Spinks. However, Spinks involved a situation inapplicable here: in Spinks the confessions were interlocking, i.e. both defendants confessed. In the instant case, LuAnne Szenay never confessed and consistently maintained that she was innocent.

In addition, the principles for which the judge cited Watkins and Spinks were subsequently undermined by the Supreme Court: the Court denied leave to appeal in Spinks,'[Footnote 10] but it reversed Watkins on the point for which the prosecution and trial judge relied on it. People v Watkins, 178 Mich App 439; 444 NW2d 901 (1989), rev'd, 438 Mich 627; 475 NW2d 727 (1991); People v Spinks, 184 Mich App 559; 458 NW2d 899, lv den, 437 Mich 875 1990).

Admission of Shawn's England's confession denied LuAnne Szenay a fair trial

and was reversible error. Codefendant England did not testify, so the evidence denied Defendant Szenay her right to confrontation. US Const, Ams V, VI, XIV; Const 1963, art 1, SS17, 20; Cruz v New York, 481 US 186; 107 S Ct 1714; 95 L Ed 2d 162 (1987); Bruton v United States, 391 US 123; 88 S Ct

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Footnote 10 A denial of leave to appeal has no precedential value. The denial of leave to appeal or of certiorari is not a ruling on the merits. The denial simply means that the Court has exercised its discretion to refuse to hear and decide the case. People v Hines, 88 Mich App 148, 152; 276 NW2d 550 (1979); Warren v Parole Board, 23 Mich App 754, 757, n2; 179 NW2d 664 (1970); Spencer v Flint Memorial Park Ass'n, 4 Mich App 157, 168; 144 NW2d 622 (1966).

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1620; 20 L Ed 2d 476 (1968); People v Watkins, 438 Mich 627; 475 NW2d 727 (1991); People v Banks, 438 Mich 408; 475 NW2d 769 (1991)[Footnote 11]

In addition, the testimony was hearsay and not admissible under any exception to the normal rule excluding hearsay. MRE 801, 802. Moreover, the confession was irrelevant and immaterial in LuAnne Szenay's case. MRE 401, 402; People v Teaque, 411 Mich 562; 309 NW2d 530 (1981); Peoule v Major, 407 Mich 394; 285 NW2d 660 (1979). Even if this evidence was arguably relevant, its minimal probative value was completely outweighed by its prejudicial effect. MRE 403; People v James Robinson, 417 Mich 661; 340 NW2d 631 (1983); People v McKinney, 410 Mich 413; 301 NW2d 824 (1981).

Because Shawn England's confession was admitted, England became a witness against LuAnne Szenay, but he could never be cross-examined. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. [T]he

cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Davis v Alaska, 415 US 308, 316; 94 S Ct 1105; 39 L Ed 2d 347 (1974). Dental of "the right of effective cross-examination ... 'would be **constitutional** error of the first magnitude and no amount of showing of want of prejudice would cure it."' Id., at 318. "The importance of cross-examination is necessarily magnified when the witness being subjected to cross-examination is the 'star witness' or an accomplice" people v Bell, 88 Mich App 34s, 349; 276 NW2d 605 (1979).

Footnote 11 In addition, see People v Etheridge, 196 Mich App 43, 47-51; 492 NW2d 4so (1992); People v Spearman, 195 Mich App 434, 441442; 491 NW2d 606 (1992); People v Passeno, 195 Mich App 91, 101; 489 NW2d 152 (1992).

Hearsay is a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the **truth** of the matter asserted. MRE 801(c). Hearsay is normally not admissible. MRE 802.

Shawn England's confession did not come within any exception to the hearsay rule, such as the coconspirator exception or the exception for statements against

penal interest. MRE 801(d)(2)(E), 804(b)(3); People v Watkins, supra; People v Vega, 413 Mich 773; 321 NW2d 675 (1982); People v Ernest Edwards, 396 Mich 551; 242 NW2d 739 (1976).

The coconspirator exception only applies to "a statement made by a concon-spirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." MRE 801(d)(2)(E); emphasis added. By the time Shawn England confessed, the conspiracy was over. His statements were not made during the course and furtherance of the crime.

Statements against penal interest are admissible if "a reasonable person in his position would not have made the statement unless he believed it to be true." MRE 804(b)(3).

> "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. nId; emphasis added.

A statement offered to inculpate LuAnne Szenay should similarly not be admissible because no corroborating circumstances clearly indicated the trustwor-

thiness of England's incrimination of Szenay. [Page 22 of original]

Even if Shawn England's confession was admissible against him, [Footnote 12] it was not admissible against LuAnne Szenay. A confession by a nontestifying codefendant is inadmissible against a defendant. Statements by codefendants are "inevitably suspect" and "uniquely and especially suspect and unreliable with regard to **accusations** directed toward alleged accomplices. n People v Watkins, 438 Mich 627, 646, 6S2; 47S NW2d 727 (1991); People v Banks, 438 Mich 408, 420-421; 475 NW2d 769 (1991); emphasis in original.

C. CONCLUSION.

Admission of Shawn England's confession against LuAnne Szenay could not have been a harmless error. Evidence of the confession bolstered the prosecution's case. The beneficiary of the error, the prosecution, must prove beyond a reasonable doubt that the error did not contribute to the verdict and obviously cannot do so in this case. US Const, Ams V, VI, XIV; Const 1963, art 1, §S17, 20; Yates v Evatt, _ US ; 111 S Ct 1884; 114 L Ed 2d 432 (1991); People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (1972).

In closing arguments the prosecutor repeatedly used Shawn England's statement in arguing for conviction of both England and LuAnne Szenay. T 1/4/91, *pp.* 34, 49-50, 52, 167, 177-178, 180. The prosecutor emphasized that as soon as he was arrested Shawn England implicated LuAnne Szenay. Id., at 34. This naming of

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Footnote 12 See Issue I of Shawn England's Brief On Appeal.

Defendant Szenay was damaging because it came long before Jim Blau arranged his plea bargain and thus had an incentive to incriminate her. The prosecutor argued that Jim Blau's testimony was "corroborated by ... the statement by Shawn. In Id., at 49. Look at the detail of his statement. ... He told them what happened and his belief or his knowledge of LuAnne's involvement." Id., at 167.

During his closing argument defense counsel for LuAnne Szenay tried to diminish the damning effect of Shawn England's confession. He referred to it as "this so-called confessions and "an alleged statement." T 1/4/91, pp. 129, 154.

Defense counsel for Shawn England also attempted to lessen the confession's damage. T 1/4/91, pp. 58-61, 67-71, 75-81, 87, 94, 100, 102. In arguing that Shawn England's admissions had been sug-

gested by the police, time after time counsel for England told the jury, "Listen to the tape." Id., at 58, 67, 71, 81, 87, 94, 100.

During deliberations the jury took England's counsel up on his requests: they asked to rehear the tape of the confession. The tape and a recorder were given to them so they could listen in the jury room. T 1/8/91, pp. 49-52.

This Court should reverse and remand for a new trial where Shawn England's confession will be suppressed.

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Appendix D

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v SHAWN MARCUS ENGLAND, Defendant-Appellant.	Unpublished May 23, 1995 No. 138219:138272 LC No. 90-1196-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LU ANNE SZENAY. Defendant-Appellant.	No. 138992 LC No. 90-1270-FC

Before: MacKenzie, P.J., and McDonald and O'Connell, JJ.

PER CURIAM.

Following a consolidated jury trial defendants were convicted of first degree

premeditated murder, MCL 750.316; MSA 28.548. Defendant Szenay was also convicted of conspiracy to commit first degree murder, MCL 750.157a; MSA 28.354(1) and defendant England pled guilty to escape from custody, MCL 750.197a; MSA 28.394(1). Defendants DOW appeal from their convictions as of right. We affirm.

The trial court did not err in denying defendant England's motion to suppress his confession. Statements of an accused made during custodial interrogation are inadmissible as substantive evidence unless the accused voluntarily, knowingly and intelligently waived his fifth amendment rights. Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). This includes the right to have counsel present during custodial interrogation. Here, England admitted he signed a waiver of rights form after having been informed of his Miranda rights. There was no violation of his fifth amendment right. There was likewise no violation of England's sixth amendment right to counsel. Extradition proceedings are not considered criminal proceedings to which the sixth amendment right attaches. People v Donaldson, 103 Mich App 42; 302 NW2d 592 (1981). Defendant's bail hearing was properly considered part of

the extradition proceedings. MCL 780.14; MSA 28.1285(14) and MCL 780.15; MSA 28.1285(15) provide for such hearings as part of extradition proceedings.

There was no error with regard to defendant England in the admission of certain pre and post murder statements and letters made and written by defendant Szenay. People v Richardson, 204 Mich App 71; 514 NW2d 503 (1994). The evidence did not inculpate England and the jury was instructed that defendant Szenay's statements were to be considered only as against her.

The court did not abuse its discretion in failing to sever defendant England and Szenay's trial People v Hana, 447 Mich 325; 524 NW2d 682 (1994). Contrary to defendants' assertions, the defenses were not "mutually exclusive" or "irreconcilable-. Hana, supra, at 349.

We also reject defendant Szenay's claim that reversal is mandated because the court erred in admitting portions of England's confession as evidence against her as well as evidence of England's escape from jail. Evidence regarding England's escape was irrelevant and thus not prejudicial to Szenay and any error in the admission of England's confession was harmless given admission of the third co-

conspirator's confession. Richardson, supra.

Finally, we find no error in the court's instruction of the jury regarding reasonable doubt People v Sammons, 191 Mich App 351; 478 NW2d 901 (1991).

Affirmed.

/s/Barbara B. MacKenzie
/s/Gary R. McDonald
/s/Peter D. O'Connell

Appendix E

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Supreme Court No.
Court of Appeals No. 138992
Circuit Court No.
90-1270-FC

-vs-

LUANNE SZENAY.
Defendant-Appellant.

BAY COUNTY PROSECUTOR
Attorney for Plaintiff- Appellee

P. E. BENNETT (P26351)
Attorney for Defendant-Appellant

BRIEF IN SUPPORT
OF APPLICATION FOR LEAVE TO APPEAL

STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR IN ADMITTING OVER DEFENSE OBJECTION THE CONFESSION OF THE CODEFENDANT, WHICH INCRIMINATED DEFENDANT LUANNE SZENAY, PARTICULARLY BECAUSE THE JUDGE RELIED UPON THE COURT OF APPEALS OPINION IN WATKINS, WHICH WAS LATER REVERSED BY THE SUPREME COURT?

Defendant-Appellant answers, "Yes..

II. WHERE DEFENDANT LUANNE SZENAY WAS TRIED FOR THE MURDER AT THE SAME TIME AS THE ALLEGED SHOOTER, SHAWN ENGLAND, AND WHERE JIM BLAU WAS A MAJOR PROSECUTION WITNESS WHO ADMITTED HIS PARTICIPATION IN THE MURDER, WAS SHE PREJUDICED AND DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR IN ADMITTING EVIDENCE THAT ENGLAND AND BLAU ESCAPED FROM THE COUNTY JAIL AND WERE RECAPTURED?

Defendant-Appellant answers, "Yes".

III. WHERE DEFENDANT LUANNE SZENAY WAS PREJUDICED BY ADMISSION AGAINST HER OF EVIDENCE THAT SHOULD ONLY HAVE BEEN ADMISSIBLE AGAINST HER CODEFENDANT, DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR IN DENYING THE DEFENSE MOTIONS TO SEVER THE TRIALS OF SZENAY AND HER CODEFENDANT?

Defendant-Appellant answers, "Yes..

IV. SHOULD DEFENDANT LUANNE SZENAY'S CONVICTIONS BE REVERSED BECAUSE OVER DEFENSE OBJECTION THE TRIAL JUDGE IMPROPERLY INSTRUCTED THE JURY ON THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT FROM THE LEGALLY INADEQUATE SECOND EDITION OF THE CRIMINAL JURY INSTRUCTIONS, INCLUDING INSTRUCTING THAT A REASONABLE DOUBT IS NOT A "POSSIBLE DOUBT" AND NOT INSTRUCTING THAT THE JURORS MUST FIND GUILT TO A MORAL CERTAINTY?

Defendant-Appellant answers, "Yes."

v

I. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN ADMITTING OVER DEFENSE OBJECTION THE CONFESSION OF THE CODEFENDANT, WHICH INCRIMINATED DEFENDANT LUANNE SZENAY, PARTICULARLY BECAUSE THE JUDGE RELIED UPON THE COURT OF APPEALS OPINION IN WATKINS, WHICH WAS LATER REVERSED BY THE SUPREME COURT.

A. FACTS

Shortly after he was arrested Codefendant Shawn England confessed to his participation in the murder of Timothy Szenay. He was still in Florida at the time, but confessed to Michigan State Police Detectives Robert Harken and John Overstreet. Most of the confession was taped. A transcript of the tape is included in the Appendix to this Brief.

Before Shawn England's confession was brought into evidence, Defendant LuAnne Szenay repeatedly objected to the admission of any statements by England as evidence against her, but the objections were overruled. T 12/4/90, p 11; T 12/18/90, pp. 135-179;5 \

T 12/19/90, pp. 150-163, 192-195. The confession was crucial evidence against both LuAnne Szenay and Shawn England. In his opening statement and in closing arguments, the prosecutor emphasized the confession in arguing for conviction of both Shawn England and LuAnne Szenay. E.g., T 12/6/90, pp. 168; T 1/4/91, pp. 34, 49-50, 52, 167, 177-178, 180.

Defense counsel for LuAnne Szenay argued that Shawn England's statements that implicated Szenay were inadmissible. He

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Footnote 5 The first part of the discussion on December 18 concerned **statements Shawn England allegedly** made to Stanley Belmont at a party in Florida before his arrest. The prosecutor ultimately **decided to use Belmont's story** only as it incriminated England **and not to use any of Belmont's** statements concerning LuAnne Szenay. T 12/18/90, p 177.

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cited the rules against admitting hearsay, the constitutional right to confront witnesses, and Bruton .6 He argued that the hearsay exception for statements against penal interest, MRE 804(3), did not apply. T 12/18/90, pp 135-142, 157-161, 167-170, 178-179; T 12/19/90, pp 152-153, 159-161, 194-195.

Both the prosecutor and the trial Judge cited the Court of Appeals opinions in Watkins and Spinks in justifying the admission of England's statements as they related to LuAnne Szenay.7 T 12/18/90, pp. 136, 149-152, 171; T 12/19/90, pp. 157, 162-163.' The judge said that the cases showed, "confessions really can be used when they implicate a codefendant when the statement that's made is against the penal interest and there are other separate instances of indicia of reliability ...- T 12/18/90, p 175.

State Police Detective-Sergeant Robert Harken testified that he and Detective John Overstreet interrogated Shawn England in Florida on March 3, 1990, the morning after his arrest. T 12/19/90, pp. 231-233. England waived his Miranda rights9 and said he was willing to talk. Id., at 232-235.

Shawn England told the detectives that Jim Blau stated that LuAnne Szenay would collect $300,000 in insurance and that Blau

Footnote 6 Bruton v United States, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968).

Footnote 7 People v Watkins, 178 Mich App 439; 444 NW2d 901 (1989), rev'd, 438 Mich 627; 475 NW2d 727 (1991); People v Spinks, 184 Mich App 559; 458 NW2d 899, lv den, 437 Mich 875 (1990).

Footnote 8 In addition, see Appendix for the prosecution's Memorandum of Law Regarding The Use of Shawn Marcus England's Statements Against Codefendant Lou Ann [sic] Szenay.

9 Miranda v Arizona, 384 US 436; 86 S Ct 1602; 15 L Ed 2d 694 (1966).

and England would get 10% of that, i.e., $30,000. T 12/19/90, p 251; T 12/21/90, pp. 12-13.

> "[H]e said that Jim Blau told him that LuAnne told him that if anything was to happen to LuAnne's husband, Tim Szenay, Jim Blau would be well taken care of and he mentioned the ten percent again. n T 12/19/90, pp. 251-252.

Also, England "said that Jim was getting money from LuAnne before and after the homicide. "Id., at 252.

Codefendant England told the detectives that after the killing Jim Blau called LuAnne Szenay from the Roundup Bar. The next morning LuAnne Szenay called Jim Blau. T 12/19/90, p 253. According to England, Ms. Szenay said that Tim Szenay had been killed and was trying to make it sound as if she was surprising Blau, in case the telephone was tapped. Id., at 254; T 12/21/90, pp. 39-41.

During Detective Harken's testimony the tape of Shawn England's confession was played to the jury. T 12/19/90' pp. 255258. On the tape England referred to LuAnne Szenay many times. He said Jim Blau told him "that Louann Szaney [sic] wanted her husband dead for various reasons. That she would get a lot of money from it and that she'd be willing to give us some." Transcript, p 2. When Detective Overstreet asked how Blau and England found the house of Tim Szenay's sister-in-law during their attempts to find Tim, Shawn England said, "I believe Lou Ann told him how to get there. n Id., at 5. Also during their searching for Tim, "I believe he called Louann ... n Id.

Shawn England said that on Wednesday, January 17, Jim Blau called LuAnne Szenay from a McDonald'-: "I remember, he was not there calling her and ah, I guess it was to get some more money. [Page 18 of original.] Transcript, p 7. "[S]he had told him ... that she just wants it done and any

amount of money, it doesn't matter. She just wants it done." Id.

After describing the murder in detail, Shawn England said the money for his plane ticket back to Florida "was supposed to come from Louann. Jim said Louann was going to give him a thousand dollars, enough for me to get home and get to Florida." Transcript, p 15. While they were in Florida after the murder but before their arrest, Jim Blau told England, "Louann is going to send me some more money." Id. When Detective Overstreet asked where Jim Blau got his information about Tim Szenay, England responded, "Louann told Jim everything he knew about Tim. n Id., at 17.

During the instruction conference before closing arguments, defense counsel for LuAnne Szenay asked for the standard instruction that Shawn England's statements could not be used against her. The trial judge refused the request for LuAnne Szenay, but granted England's request for the corresponding instruction on any statements by Szenay. T 1/3/91, pp. 93-94; see CJI2d 4.1, 4.2.

The judge later instructed the Jury, "Defendant LuAnne Szenay's statements, if any, have been admitted as evidence only as to her. And they cannot be used

against Shawn England, and you must not do so." T 1/8/91, p 16. Of course, since they were not given the corresponding instruction that England's statements could not be used against Szenay, the given instruction reemphasized to the jury that they could use England's confession against her.

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B. ARGUMENT

In admitting Shawn England's confession as evidence against LuAnne Szenay, the trial judge relied on the Court of Appeals opinions in Watkins and Spinks. However, Spinks involved a situation inapplicable here: in Spinks the confessions were interlocking, i.e. both defendants confessed. In the instant case, LuAnne Szenay never confessed and consistently maintained that she was innocent.

In addition, the principles for which the judge cited Watkins and Spinks were subsequently undermined by the Supreme Court: the Court denied leave to appeal in Spinks,'[Footnote 10] but it reversed Watkins on the point for which the prosecution and trial judge relied on it. People v Watkins, 178 Mich App 439; 444 NW2d 901 (1989), rev'd, 438 Mich 627; 475 NW2d 727 (1991); People v Spinks, 184 Mich App 559; 458 NW2d 899, lv den, 437 Mich 875 1990).

Admission of Shawn's England's confession denied LuAnne Szenay a fair trial and was reversible error. Codefendant England did not testify, so the evidence denied Defendant Szenay her right to con-

frontation. US Const, Ams V, VI, XIV; Const 1963, art 1, SS17, 20; Cruz v New York, 481 US 186; 107 S Ct 1714; 95 L Ed 2d 162 (1987); Bruton v United States, 391 US 123; 88 S Ct

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Footnote 10 A denial of leave to appeal has no precedential value. The denial of leave to appeal or of certiorari is not a ruling on the merits. The denial simply means that the Court has exercised its discretion to refuse to hear and decide the case. People v Hines, 88 Mich App 148, 152; 276 NW2d 550 (1979); Warren v Parole Board, 23 Mich App 754, 757, n2; 179 NW2d 664 (1970); Spencer v Flint Memorial Park Ass'n, 4 Mich App 157, 168; 144 NW2d 622 (1966).

[Page 20 of original]

1620; 20 L Ed 2d 476 (1968); People v Watkins, 438 Mich 627; 475 NW2d 727 (1991); People v Banks, 438 Mich 408; 475 NW2d 769 (1991)[Footnote 11]

In addition, the testimony was hearsay and not admissible under any exception to the normal rule excluding hearsay. MRE 801, 802. Moreover, the confession was irrelevant and immaterial in LuAnne Szenay's case. MRE 401, 402; People v Teaque, 411 Mich 562; 309 NW2d 530 (1981); People v Major, 407 Mich 394; 285 NW2d 660 (1979). Even if this evidence was arguably relevant, its minimal probative value was completely outweighed by its prejudicial effect. MRE 403; People v James Robinson, 417 Mich 661; 340 NW2d 631 (1983); People v McKinney, 410 Mich 413; 301 NW2d 824 (1981).

Because Shawn England's confession was admitted, England became a witness against LuAnne Szenay, but he could never be cross-examined. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. [T]he cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Davis v Alaska, 415 US 308, 316; 94 S Ct 1105; 39 L Ed 2d 347 (1974). Dental of "the right of effective cross-examination ... 'would be **constitutional** error of the first magnitude and no amount of showing of want of prejudice would cure it."' Id., at 318. "The importance of cross-examination is necessarily magnified when the witness being subjected to cross-examination is the 'star witness' or an accomplice" people v Bell, 88 Mich App 34s, 349; 276 NW2d 605 (1979).

Footnote 11 In addition, see People v Etheridge, 196 Mich App 43, 47-51; 492 NW2d 4so (1992); People v Spearman, 195 Mich App 434, 441442; 491 NW2d 606 (1992); People v Passeno, 195 Mich App 91, 101; 489 NW2d 152 (1992).

Hearsay is a statement, other than one made by the declarant while testifying at the trial, offered in evidence to

prove the **truth** of the matter asserted. MRE 801(c). Hearsay is normally not admissible. MRE 802.

Shawn England's confession did not come within any exception to the hearsay rule, such as the coconspirator exception or the exception for statements against penal interest. MRE 801(d)(2)(E), 804(b)(3); People v Watkins, supra; People v Vega, 413 Mich 773; 321 NW2d 675 (1982); People v Ernest Edwards, 396 Mich 551; 242 NW2d 739 (1976).

The coconspirator exception only applies to "a statement made by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." MRE 801(d)(2)(E); emphasis added. By the time Shawn England confessed, the conspiracy was over. His statements were not made during the course and furtherance of the crime.

Statements against penal interest are admissible if "a reasonable person in his position would not have made the statement unless he believed it to be true." MRE 804(b)(3).

> "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances

clearly indicate the trustworthiness of the statement. n Id; emphasis added.

A statement offered to inculpate LuAnne Szenay should similarly not be admissible because no corroborating circumstances clearly indicated the trustworthiness of England's incrimination of Szenay. [Page 22 of original]

Even if Shawn England's confession was admissible against him, [Footnote 12] it was not admissible against LuAnne Szenay. A confession by a nontestifying codefendant is inadmissible against a defendant. Statements by codefendants are "inevitably suspect" and "uniquely and especially suspect and unreliable with regard to **accusations** directed toward alleged accomplices. n People v Watkins, 438 Mich 627, 646, 6S2; 47S NW2d 727 (1991); People v Banks, 438 Mich 408, 420-421; 475 NW2d 769 (1991); emphasis in original.

C. CONCLUSION.

Admission of Shawn England's confession against LuAnne Szenay could not have been a harmless error. Evidence of the confession bolstered the prosecution's case. The beneficiary of the error, the prosecution, must prove beyond a reasonable doubt that the error did not contribute to the verdict and obviously can-

not do so in this case. US Const, Ams V, VI, XIV; Const 1963, art 1, §S17, 20; Yates v Evatt, _ US ; 111 S Ct 1884; 114 L Ed 2d 432 (1991); People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (1972).

In closing arguments the prosecutor repeatedly used Shawn England's statement in arguing for conviction of both England and LuAnne Szenay. T 1/4/91, *pp.* 34, 49-50, 52, 167, 177-178, 180. The prosecutor emphasized that as soon as he was arrested Shawn England implicated LuAnne Szenay. Id., at 34. This naming of

Footnote 12 See Issue I of Shawn England's Brief On Appeal.

Defendant Szenay was damaging because it came long before Jim Blau arranged his plea bargain and thus had an incentive to incriminate her. The prosecutor argued that Jim Blau's testimony was "corroborated by ... the statement by Shawn. n Id., at 49. Look at the detail of his statement. ... He told them what happened and his belief or his knowledge of LuAnne's involvement." Id., at 167.

During his closing argument defense counsel for LuAnne Szenay tried to diminish the damning effect of Shawn England's confession. He referred to it as "this so-called confessions and "an alleged statement." T 1/4/91, pp. 129, 154.

Defense counsel for Shawn England also attempted to lessen the confession's damage. T 1/4/91, pp. 58-61, 67-71, 75-81, 87, 94, 100, 102. In arguing that Shawn England's admissions had been suggested by the police, time after time counsel for England told the jury, "Listen to the tape." Id., at 58, 67, 71, 81, 87, 94, 100.

During deliberations the jury took England's counsel up on his requests: they asked to rehear the tape of the confession. The tape and a recorder were

given to them so they could listen in the jury room. T 1/8/91, pp. 49-52.

This Court should reverse and remand for a new trial where Shawn England's confession will be suppressed.

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Appendix F

Order

entered: March 26, 1996

Michigan Supreme Court

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh

Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

103262

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

LU ANNE SZENAY,
Defendant-Appellant.

SC: 103262
COA: 138992
LC: 90-1270-FC

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, J., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court
March 26, 1996 s/ Jacqueline B. MacKinnon

Appendix G

Sixth Amendment
to the
Constitution of the United States

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the Strate and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Appendix H

STATE OF MICHIGAN

IN THE EIGHTEENTH JUDICIAL CIRCUIT COURT (BAY COUNTY)

PEOPLE OF THE STATE OF MICHIGAN

V

FILE NO. 90-1196

SHAWN MARCUS ENGLAND,

Defendant.

PEOPLE OF THE STATE OF MICHIGAN

V

FILE NO. 90-1270

LU ANNE SZENAY,

Defendant.

JURY TRIAL - VOLUME VIII OF XVII

BEFORE THE HONORABLE WILLIAM J. CAPRATHE, CIRCUIT JUDGE

Bay City, Michigan - Wednesday, December 19, 1990

APPEARANCES:

FOR THE PEOPLE: TIMOTHY J. KELLY P36209 504 Bay County Building Bay City, MI 48708 (517) 895-8577

FOR THE DEFENDANT ENGLAND: THOMAS J. PLACHTA P23705 117 S. Univer-

sity St. Mt. Pleasant, MI 48858 (517) 773-5900

FOR THE DEFENDANT SZENAY: ELBERT L. HATCHETT P14735 485 Orchard Lake Road Pontiac, MI 48053 (313) 334-1587

Detective Harken's Testimony Relating Co-defendant England's Statement (Transcript of December 19, 1990, pages 251-254)

Page 251 - lines 12-25

Q. Okay. Thank you. Did there--was there any mone-money mentioned in this conversation?

A. Yes. He said that Jim was going to be--Jim mentioned that LuAnne, Tim Szenay's wife, would be collecting three hundred dollars in insurance--

Q. Three hundred?

A. Three hundred thousand dollars--

Q. Okay.

A. --in insurance, and he said that they would be getting ten percent of that, thirty-thousand dollars.

Q. What did-what else did he say about that ten percent?

A. She said that--he said that Jim Blau told him that LuAnne told him that if anything was to happen to LuAnne's husband, Tim Szenay, Jim Blau would be well taken care of

Page 252 - lines 1-9

and he mentioned that ten percent again.

Q. Did he indicate how much money he was supposed to get out of this deal?

A. He said he was gonna get half of that thirty thousand dollars, which would be fifteen thousand dollars.

Q. Did he say anything about Jim getting any money before or after this?

A. He said that Jim was getting money from LuAnne before and after the homicide.

Page 253 - lines 12-25

Q. Did he indicate if Jim had made any contact with LuAnne either that night or the next day?

A. Shawn told me that Jim called LuAnne on the night of the homicide from the Round-up Bar and that the next morning that he--LuAnne called Jim - hold on a second here. Told me that-told me that Jim called LuAnne that night from the Round-up Bay and that he talked to her the next morning. He called her from the Round-up. LuAnne called Jim back at Jim's dad's house the next morning and he overheard them talking.

Q. When you refer to he, you're talking to Shawn?

A. Shawn, he overheard Shawn (sic) talking to LuAnne.

Q. Okay. Did he indicate what he heard Jim Blau saying during this conversation?

Page 254 - lines 1-9

A. Yes, he said during that conversation, Jim-LuAnne was telling Jim Blau that her husband had been killed and

it--was trying to make it sound like she was making the announcement to Jim Blau and he said the reason they were doing that is-is they figures their lines were tapped at that point and they figured the police were listening in so-so LuAnne was trying to make it sound like-like it was a surprise or a surprise announcement to Jim Blau that Jim Blau didn't know about this.

STATE OF MICHIGAN

IN THE EIGHTEENTH JUDICIAL CIRCUIT
COURT (BAY COUNTY)

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1196

SHAWN MARCUS ENGLAND,

Defendant.

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LU ANNE SZENAY,

Defendant.

JURY TRIAL - VOLUME XI OF XVII

BEFORE THE HONORABLE WILLIAM J. CAPRATHE, CIRCUIT JUDGE

Bay City, Michigan - Thursday, December 27, 1990

APPEARANCES:

FOR THE PEOPLE: TIMOTHY J. KELLY P36209 504 Bay County Building Bay City, MI 48708 (517) 895-8577

FOR THE DEFENDANT ENGLAND: THOMAS J. PLACHTA P23705 117 S. University St. Mt. Pleas-

ant, MI 48858 (517) 773-5900

FOR THE DEFENDANT SZENAY: ELBERT L. HATCHETT P14735 485 Orchard Lake Road Pontiac, MI 48053 (313) 334-1587

Q. How did-how did you get Shawn England up here?

A. With a plane ticket I purchased from that initial money . . .

Page 174 - lines 4-9

Q. Did LuAnne Szenay ever send you any money when you were in Florida?

A. Yes, she did.

Q. How much, if you can recall?

A. The first time, she sent me a couple hundred dollars. And then, after that, she sent me a thousand dollars.

Appendix I

STATE OF MICHIGAN

IN THE EIGHTEENTH JUDICIAL CIRCUIT

COURT (BAY COUNTY)

PEOPLE OF THE STATE OF MICHIGAN

FILE NO. 90-1196

V

SHAWN MARCUS ENGLAND,

Defendant.

PEOPLE OF THE STATE OF MICHIGAN

V

FILE NO. 90-1270

LU ANNE SZENAY,

Defendant.

JURY TRIAL - VOLUME XII OF XVII

BEFORE THE HONORABLE WILLIAM J. CAPRATHE, CIRCUIT JUDGE

Bay City, Michigan - Friday, December 28, 1990

APPEARANCES:

FOR THE PEOPLE: TIMOTHY J. KELLY P36209 504 Bay County Building Bay City, MI 48708 (517) 895-8577

FOR THE DEFENDANT ENGLAND: THOMAS J. PLACHTA P23705 117 S. University St. Mt. Pleas-

ant, MI 48858 (517) 773-5900

FOR THE DEFENDANT SZENAY:

ELBERT L. HATCHETT P14735 485 Orchard Lake Road Pontiac, MI 48053 (313) 334-1587

Testimony of Co-defendant James Blau
12/28/90 - Page 44 - lines 8-9, 13

Q. As far as you know, did Shawn England ever meet LuAnne Szenay?

THE WITNESS: No. Not that I know of.

Page 184 - lines 16-22

Q. Mr. Blau,let me see if I can repeat my question again, if you would answer it for me. At the time that you were arrested in Florida by Detectives Harken and Overstreet, they indicated to you, they explained to you that LuAnne Szenay had supposedly implicated you in the murder of Timothy Szenay; isn't that correct?

A. Yes, they did.